SUPREME COURT
OF THE UNITED STATES.

NO. 305.

WILLIAM JACKSON, MASTER OF THE STEAMSHIP "COUNSELLOR," PLAINTIFF IN ERROR.

Versus

ALLEN, WEST & BUSH; BROWN BROTHERS & COMPANY, ET AL.

NO. 306.

BROWN, RROTHERS & COMPANY, PLAINTIFFS IN ERROR,

Versus

ALLEN, WEST & BUSH, ET AL.

ARGUMENT FOR ALLEN, WEST & BUSH, DEFENDANTS IN ERROR.

Defendants in Error, doing business in New Orleans, under the firm name of Allen, West & Bush, sold, in New Orleans, on June 3, 1884, to Alfred F. Jones, one of the defendants in the lower Court, 268 Bales of Cotton, for the price of $12665.25—terms cash.

On the following day, Jones received warehouse delivery of the Cotton.

On June 6th, Jones received from the master or agents of the steamship "Counsellor," then loading at New Orleans, for Liverpool, a Bill of Lading for the Cotton—and on the same day, the Cotton was in possession of and in course of being loaded on said steamship.

On the same day, Jones endorsed the Bill of Lading in usual form, and transferred or pledged the same to Plaintiffs in Error, Brown Brothers & Company, who paid for or advanced thereon the sum equivalent in currency of the United States to $12882.84—the full value of the Cotton.

On the same day, Jones paid to Allen, West & Bush, on account of the purchase price of said Cotton, $1800—derived from moneys received by him from Brown Brothers & Company, on account of the sale or pledge to them of the said Bill of Lading.

On June 7th, 1884, Defendants in Error instituted their suit in the Civil District Court for the Parish of Orleans, claiming vendors' lien upon the Cotton for the unpaid portion of the price thereof, and on the same day caused the same to be sequestered, and by the proper officer of the court to be taken out of the possession of Jackson, one of the Plaintiffs in Error, master of steamship "Counsellor."

This suit is brought under the last paragraph of Article 3227 of the Civil Code of Louisiana.

The entire Article reads as follows:

"He who has sold to another any movable property, which "is not paid for, has a preference on the price of his property "over the other creditors of the purchaser, whether the sale be "made on a credit or without, if the property still remains in "the possession of the purchaser.

"So that, although the vendor may have taken a note, bond "or other acknowledgment from the buyer, he still enjoys the "privilege.

"*Any person who may sell the agricultural products of the* "*United States in the City of New Orleans shall be entitled to a* "*special lien and privilege thereon to secure the payment of the* "*purchase money, for and during the space of five days only,* "*after the date of delivery, within which time the vendor shall be*

" *entitled to seize the same in whatsoever hands or place they*
" *may be found, and his claim for the purchase money shall have*
" *preference over all others. If the vendor gives a written order*
" *for the delivery of any such products, and should say therein*
" *that they are to be delivered without vendor's privilege, then no*
" *lien shall attach thereto.*"

The portion of Article 3227 italicised constituted no part of the original Article. Previous to 1854, the vendor of agricultural products of the United States, sold in New Orleans, had only the ordinary vendor's lien given by the part of the Article that is not italicised.

The lien was lost forever the instant the possession or ownership passed from the purchaser to a third person.

The want of a law for the better protection of vendors of such agricultural products sold in New Orleans, shortly after the decision in the case of Campbell *vs.* Penn, 7 An., 371—a decision which the Supreme Court of Louisiana said, in the case of Gumbel *vs.* Beer, 36 An., 490, " threatened the destruc-
" tion of agricultural industry in this State "—found expression, first in an Act of the Legislature, found on page 45 of the Session Acts of 1854, and, finally, on page 363 of the Session Acts of 1855. The differences in the body of the two Acts are verbal merely.

In revising the Civil Code, in 1870, the Act of 1855 was added bodily to Art. 3227, as amendatory thereto, and is, *in totidem verbis*, as italicised in this brief.

The first case under the Acts of 1854 and 1855, reported, was that of Miltenberger *vs.* Hatch—Aldrech, intervenor, 13 An., 528. The sale was *for cash*, the price not paid, and the cotton in possession of intervenor as a pledge to secure advances made by him to the vendee. Plaintiff's seizure was made within the five days of delivery, and his privilege was ad-

judged to be first, and he entitled to be paid by preference to the pledgee.

But it was contended in the Circuit Court on behalf of Brown Brothers & Company, that being the holders, as pledgees or purchasers, of the *Bill of Lading* for the Cotton, they were in a different and better position, than a purchaser of such Cotton, without such Bill, but to whom there had been *actual delivery.*

It is submitted that the contention finds support neither in the adjudicated cases in Louisiana, nor in the general commercial law.

The second reported case in Louisiana under the Acts referred to was that of Tyree *vs.* Sand—Miller, intervenor, 24 An., 363—wherein an Alabama lien, similar to that given by our own law, was enforced in the State of Louisiana. In that case, intervenor was the purchaser of the cotton from Sand, who had not paid for it. *A Bill of Lading* had been issued for the cotton, and though by some mistake it had not been taken in the name of Miller, yet the Supreme Court treated the case as if the bill of lading had been assigned regularly to him; but did not, *because* of such bill of lading, consider him in any better right than any other *purchaser* of the cotton *without* such bill, would have been. The reasons of the case were all founded in our law, and the Alabama lien enforced because the purpose of our law accorded therewith.

Then follow two cases, in which Mr. Justice Morgan delivered the opinions of the Supreme Court (Delgado & Co., *vs.* Wilber & Co., 25 An., 82, and Howell & Co. *vs.* Parish, 26 An., 6), in both which cases the Louisiana National Bank was intervenor, *holding bills of lading*, in pledge, to secure advances made upon the cotton upon the faith of those Bills.

In the former case, Mr. Justice Morgan and two other members of the Court held the amendment to Art. 3227 (to wit:

the act of 1855) did not apply to sales made *for cash, and for that reason alone* decided in favor of the intervening bank.

The Chief Justice, Mr. Justice Howell agreeing with him, concurred in the *conclusion* reached by the majority, but *only* because the plaintiffs had not complied with the then constitutional requirement of *recording their lien.*

(See Art. 123, Constitution of 1868, which declares that "no "mortgage or privilege shall hereafter affect third parties, un- "less recorded in the parish where the property to be affected is "situated.")

In the latter case, Mr. Justice Morgan and *one* other member of the Court concurred in favor of the intervenor, on the ground that the sale by plaintiffs had been *for cash.* The Chief Justice and Mr. Justice Howell concurred in the *conclusion* reached, but again upon the sole ground of want of registry of plaintiffs' lien.

Mr. Justice Wiley, who was one of the three concurring Justices in the former opinion, now dissented *both* as to the *law* and the facts.

The circumstance that the Bank was the holder *of bills of lading* cut not the *least* figure in either case. The solitary reasons *assigned* against the plaintiffs' right, by any of the Court, were want of privilege, the sales being *for cash*, and the loss of privilege from failure to register.

Three cases have come before the present Supreme Court of Louisiana, requiring application of the Act of 1855, as incorporated into Art. 3227 of the Code, to wit: Gumbel & Co. *vs.* Beer—Lionnet *et als.* intervenors, 36 La. An., 489; Hawkins & Roberts *vs.* Beer—Forrestier, intervenor, 37 An., 53; and Harris, Parker & Co. *vs.* Nicolopulo—Citizens' Bank, intervenor, 38 La. An., 12.

In Gumbel & Co. *vs.* Beer, the Court said:

"It is apparent, as it stood formerly, the law as found in

" Art. 3194 of the Code of 1825, now Art. 3227 of the Revised " Code, allowed a privilege to the vendor on movables sold by " him *for cash or on credit*, over the creditors of the purchaser, " if the property remained in possession of the latter; but in " 1854, the Legislature, for reasons of public interest, however, " thought it just and necessary to formulate *an exception* and " to permit the assertion and reinforcement of the privilege on " agricultural products of the United States, sold in New Or- " leans, from the term of five days from delivery, in *whatsoever* " *hands or place* they might be found.

" The incorporation of the Act of 1854 into the Revised " Code as part of the old Art. 3197, now 3227, amounts to demon- " stration, that the general rule laid down in the first paragraph, " which restricted the privilege to the case where the property " had continued in the possession of the vendee, was, from the " beginning, modified so as to extend the exercise of *such* privi- " lege on agricultural products, *in whatsoever hands found*, " within five days of the date of delivery, *whatever the terms of* " *sale were*, where the price was unpaid and the vendor had not " voluntarily and formally released it.

* * * * * * *

" Our conception of the entire legislation and of the juris- " prudence is, therefore, that the vendor of agricultural pro- " ducts of the United States, sold in New Orleans, has a lien " on the commodity sold for the payment of the unpaid price, " *whether the sale was made for cash or on credit*, and is entitled " to enforce it by seizure of the identical article, either in the " possession of the vendee, or in the hands of third parties, " within five days after delivery thereof, *provided*, he has not " waived it, and *perhaps* provided the same has not been " pledged on the faith of a properly issued warehouse or similar " receipt, or bill of lading.

* * * * * * *

" The plaintiffs having their lien and the intervenors know-
" ing the law, and *having it in their power to ascertain the facts*,
" the latter cannot be listened to invoke the rule that 'as be-
" 'tween two innocent parties the loss should fall on the one
" 'whose imprudent confidence has enabled the wrongdoer to
" 'get credit.' "

In the case of Hawkins & Roberts *vs.* Beer, where the sale had been made *for cash*, the Court said:

" The appellant's counsel cites a number of decisions which
" he construes as asserting that the five days' lien does not
" exist upon produce sold *for cash*, after it has been transferred
" to a third party, but these decisions and the whole legislation
" and jurisprudence upon that matter have lately been re-
" viewed by us in Gumbel *vs.* Beer, 36 An., 484, where we held
" that the lien exists *whether the sale was made for cash or on*
" *credit, and is enforcible after the produce has gone into the pos-*
" *session of third parties under a bona fide sale, equally as well*
" *as while it is in the possession of the original vendee.* Renewed
" examination confirms the correctness of our ruling upon
" that question and the elaborateness with which it was
" treated in that opinion, renders any further discussion
" superfluous."

In *neither* of these cases was there a bill of lading; but *in both* the Court distinctly held that the special lien attached, equally, whether the terms of sale were cash or credit, and that the goods were as subject to seizure in the hands of a *bona fide* purchaser from, as in the hands of, the original vendee himself.

These opinions must necessarily be regarded as settling the jurisprudence of the State, so far as relates to the effect upon the special lien arising from the cash or credit character of the sale.

If it had not been for the qualifying clause added to the

summary of its conclusions of law, by the Court, in Gumbel *vs.* Beer (page 494), to wit: "*provided* he" (the vendor) "has "not waived it," (the special lien meaning,) "and, PERHAPS, "*provided the same has not been validly pledged on the faith of a properly issued warehouse or similar receipt, or bill of lading,*" it is not improbable that the contention of plaintiffs in error would have been unheard of.

In the first place, it is proper to say that the proviso is *obiter*. Neither party claimed under a warehouse or Bill of Lading. For the decision of the question before the Court, it was a matter of no consequence what were or might be the rights of a pledgee "on the faith of a properly issued warehouse or simi- "lar receipt, or bill of lading."

In the Circuit Court it was contended that this *proviso* was intended to stamp the title evidenced by a Bill of Lading, with a quality that did not pass by sale and actual delivery of the property itself—that while sale and actual delivery did not divest the vendor's five days' lien, "*in whatsoever hands or* "*place* the products might be found"—a sale or pledge of Bill of Lading would divest such lien.

This contention is based upon Act No. 150 of the Legislature of Louisiana of 1868 (Session Acts, p. 193), and Act No. 72, of 1876 (Session Acts, p. 113).

The Act of 1868 is entitled "An Act to prevent the issue of "false receipts or bills of lading and to punish fraudulent "transfers of property by cotton presses, wharfingers and "others."

(Art. 114 of the Constitution of Louisiana of 1868 provides that the object or objects of every law of the Legislature shall be expressed in its title.)

Section 5 of the Act provides, "That no master, owner or "agent of any boat or vessel * * * * shall sign or give "any bill of lading, receipt * * for any merchandise or

" property by which it shall appear that such merchandise or " property has been shipped on board of any boat, vessel, " * * * unless the same shall have been actually shipped " and put on board, and shall be at the time actually on board, " or delivered to such boat, vessel, * * * to be carried or " conveyed as expressed in said bill of lading, receipt or other " voucher or document."

Section 6 of the Act provides; "That cotton press receipts " given for any goods, wares, merchandise, grain, flour or other " produce or commodity stored or deposited with any cotton " press, wharfinger, or other person, or any bill of lading given " by any forwarder, boat, vessel, railroad, transportation or " transfer company, may be transferred by endorsement thereon, " and any person to whom the same may be transferred shall " be deemed and taken to be the owner of the goods, wares, " merchandise, grain, flour, or other produce or commodity " therein specified, *so far as to give validity to any pledge, lien* " *or transfer made or created by such person or persons;* but no " property shall be delivered except on the surrender and cancel- " lation of said original receipt or bill of lading of [or] the " endorsement of such delivery thereon; in case of partial " delivery, all cotton press receipts or bills of lading, however, " which shall have the words " not negotiable " plainly written " or stamped on the face thereof, shall be exempt from the " provisions of this Section."

Section 9 provides, "That all receipts, bills of lading, vouchers, " or other documents issued by any cotton press, wharfinger, " forwarder, or other person, boat, vessel, railroad, transporta- " tion, or transfer company, as by this Act provided, *shall be* " *negotiable by endorsement in blank*, or by special endorsement, " in the same manner and to the same extent as bills of ex- " change and promissory notes are negotiable."

Act No. 72 of 1876, is entitled " An Act governing the man-

" ner in which cotton press receipts, warehouse receipts, or the " receipts of other custodians of any property whatever, shall " be issued, in all cases where such receipts shall or may be used " or pledged as collateral security for money advanced or bor- " rowed on faith of the property therein specified, and govern- " ing the delivery and disposal of the property for which such " receipts may be issued."

The last paragraph of Section 2 of the Act reads: " All " warehouse receipts intended for pledge under the provisions " of this Act, shall be paraphed before being issued, as follows: " For hypothecation in accordance with the provisions of this " Act."

Section 4 of the Act provides, " That parties who may bor- " row money on the faith of warehouse receipts, representing " property in store, shall file their affidavit with the pledgees " that such property is theirs, the pledgors' personal property "— " or other fact giving him the right, under the Act, to pledge " the warehouse receipt."

Section 5 provides: " That the vendor's lien of five days, now " allowed in commercial transactions for the payment of the " purchase price, shall not be affected by the provisions of this " Act, *except in case in which a warehouse receipt* has been " pledged as collateral for money borrowed. The holder of the " *warehouse receipt* shall be considered and held as the actual " owner of the property described in the receipt, and no clause " in this act shall operate to the detriment or injury of the " holder of a *warehouse receipt*, to the extent of the value of " the property specified, *made and issued in accordance with and* " *under the provisions of this Act; provided,* that where the " factor, agent or pledgor may have wrongfully pledged, in vio- " lation of this Act, any property, the lien of the owner shall " be valid even against the third holder of the warehouse " receipt."

The plaintiffs in error held no *warehouse receipt*—nor has their possession of the bill of lading any of the accompaniments required by section 4 of the Act as above quoted.

Section 8 of the Act provides, "That all *warehouse receipts* "as by this Act provided, shall be negotiable by endorsement in "blank, or by special endorsement, in the same manner and to "the same extent as bills of exchange and promissory notes "now are."

No other part of either of the Acts quoted from have the remotest relation to the issues in the instant case.

In Delgado *vs.* Wilbur & Co., 25 La. An., 82, already referred to, the Court said: "The sixth section of the Act of 1868, con- "cerning the transfer of bills of lading and the effects of those "transfers is only a *legislative sanction given to the commercial* "*law*, of universal application, by which it is held that a bill of "lading, legally transferred, gives title to all the property it "represents. *It does not clash with the statute of 1855, incorpo-* "*rated in the 3227th Article of the Code.*"

And concerning both Acts, the Court in Gumbel *vs.* Beer, 36 La. An., p. 492, said as follows:

"A patient and careful examination of the two Acts, of "1868, p. 193, No. 150, and of 1876, p. 113, No. 72, *satisfies us* "*that neither was designed to repeal the Acts of 1854 and 1855,* "*as now embodied in the Revised Code as Article 3227.*

"The object of the former Act, as its title indicates, was to "prevent the issue of false receipts or bills of lading, and to "punish fraudulent transfers of property by cotton presses, "wharfingers and others.

"The purpose of the latter, as announced by its title, was to "govern the manner in which cotton press and other receipts "should be issued, and the delivery and disposal of the "property for which such receipts may be issued.

"It is true that by Section 5 of that last Act, while 'the

" ' vendor's lien of five days' privilege' now allowed in commer-
" ' cial transactions, for the payment of the purchase price,'
" is formally recognized, and is declared as 'not to be affected
" ' by the provisions of this Act,' there is a stipulation that it
" shall not prevail 'in case a warehouse receipt has been
" ' pledged as collateral for money borrowed; * * * *pro-*
" ' *vided*, that when the * * * * pledgor may have
" ' wrongfully pledged, *in violation of this Act*, any property,
" ' the lien of the owner shall be valid even against the third
" ' holder of the warehouse receipt.'

" The guarded language used," concludes the Court, " is
" expressive of the unwillingness of the law-giver in any way
" (except in that specially mentioned, which does not arise in
" this controversy) to impair, alter or abridge the lien pre-
" viously conceded in favor of merchants or vendors of agricul-
" tural products of the United States. *Besides, it may be a*
" *matter of inquiry how far the derogation, however exceptional,*
" *may be deemed expressed in the title of the law.*"

Since this cause was tried in the Circuit Court, the very question contended for by the Plaintiff in Error has come before and been decided by the Supreme Court of Louisiana, in Harris, Parker & Co. *vs.* Nicolopulo, 38 An., p. 13.

The Court said: " This case presents the question whether
" the unpaid vendor of Cotton, or the holder for value of the
" bill of lading for it, shall prevail in a contest for the amount
" of the purchase price.

* * * * * * *

" The defendant bought fifty-nine bales of cotton from the
" plaintiffs for $2707.12, on January 3, 1885, and did not pay
" for it. The cotton was delivered on January 5th, following,
" and the plaintiffs instituted this suit for the recovery of the
" price within the five days specified in Article 3227 Revised
" Civil Code. Meanwhile, between the delivery and the institu-

" tion of this suit, the purchaser, Nicolopulo, had shipped the " cotton, drawn his bill of exchange against it, and the bill of " exchange with bill of lading attached was bought by the Cit- " izens Bank for full value, both bills having been endorsed and " delivered to the Bank and the cotton being on shipboard.

* * * * * * *

" The Bank contends that the Act of 1868, to prevent the " issue of false receipts or bills of lading, and to punish fraudu- " lent transfers of property by cotton presses and others, over- " rides and repeals the preference given to the vendor of agri- " cultural products, whenever the purchaser has shipped the " cotton and transferred the bill of lading for value.

" The point was not presented in Gumbel *vs.* Beer, 36 An., " 484. Nevertheless, we think the principles therein an- " nounced control this case, and the whole reasoning in that " opinion foreshadows our conclusion in this.

" *The intention of the Legislature to protect the vendor of* " *agricultural products against the world, for a given time after* " *their sale*, was first manifested a little more than thirty years " ago, and it has been persistently and consistently adhered to " ever since. The Act of 1854 was, of course, included in the " revisal of the following year, and it was incorporated in the " Code upon its revisal in 1870. Jurisprudence had meanwhile " recognized that intention in all its fullness and had enforced " it whenever occasion arose.

" The Act of 1868 recognized the negotiability of bills of " lading, and declared that the transferer of them shall be " deemed and taken to be the owner of the goods therein speci- " fied, so far as to give validity to any pledge, lien or transfer " made or created by such person.—Acts, p. 194. But this was " only the announcement in general terms of certain qualities " imparted to bills of lading, and a declaration that the trans- " feree of them under normal circumstances should have and

" exercise certain rights. He was deemed the owner so far as " to give validity to his pledge of them, or lien upon them, or " transfer of them; but it requires very different and much " stronger and more precise language to express the intention " that a lien given the vendor, within a given time absolute, " and overmastering every other claim, which legislation had " created and jurisprudence enforced, was to be done away with " and abrogated. The enactment in the same statute whereby " a criminal offence is created, and a violation of its provisions is " declared punishable with severe penalties, does not add force " to the suggestion that the vendor's lien was intended to be " destroyed, or that it was to be relegated to a lower rank in " the scale of privileges and subordinated to a bill of lading.

" Even if this were less clear, the subsequent legislation of " 1876, Acts, p. 113, would put it beyond cavil, for it is there " enacted that the vendor's lien of five days, now allowed in " commercial transactions for the payment of the purchase " price, shall not be affected by that Act, except where a *ware-* " *house receipt* has been *pledged as collateral for money bor-* " *rowed*, and *in order that it may come within the benefit of the* " *exception, the receipt must be paraphed, before issue,* 'FOR " HYPOTHECATION.'

* * * * * * *

" Had it been intended that bills of lading should, *under any* " *circumstances*, have been given priority *over the vendor's lien*, " and have accorded a rank alongside of warehouse receipts, apt " language would have been found to express that intention, " and the circumstance that warehouse receipts were given such " dignity *by name*, and no mention is made of bills of lading, " shows that the Legislature intended to confine this alteration " of the law to the former.

" The Act of 1876 has impressed upon it throughout the

" the intention to give this priority to a *paraphed warehouse* " *receipt and nothing else.* * * * ."

The opinion just cited is but stating in another way the declaration of the Court in Delgado *vs.* Wilbur & Co., 25 La. An., 82, that the " sixth Section of the Act of 1868, concerning " the transfers of bills of lading and the effects of those trans- " fers is only a *legislative sanction* given to the commercial law " of universal application, by which it is held that a bill of " lading, legally transferred, gives title to all the property it " represents," and does not clash with the Act of 1854, made part of Article 3227 of the Code.

Benjamin on Sales, Sec. 864: " A bill of lading is not nego- " tiable in the same sense as a bill of exchange, and, therefore, " the mere honest *possession* of a bill of lading endorsed in " blank, or in which the goods are made deliverable to bearer, " is not such a title to the goods as the like possession of a bill " of exchange would be to the money promised to be paid by " the exceptor. *The endorsement of a bill of lading gives no better* " *right to the goods than the endorser himself had.*"

The italics are Mr. Benjamin's.

In a foot note, Smith's Mercantile Law (Holcombe & Gholson's edition), p. 379, it is said the subject of endorsement and transfer of bills of lading has lately undergone critical examination, leading to a modified enunciation of the law.

" The endorsement and transfer of a bill of lading *amounts to* " *nothing more than a symbolical delivery of the goods.* In the " language of Lord Ellenborough, in Newsom *vs.* Thornton, 6 " East., 41, ' *it can operate no farther than a direct delivery of the* " ' *goods would have done.*' It is demonstrated by the American " editors of Smith's Leading Cases, vol. 1, 751, note to Lick- " barrow *vs.* Mason, in an able and elaborate analysis of the " adjudicated cases, that the possession of the bill of lading can " clothe the holder with no greater powers than would result

" from the actual possession of the goods. It does not consti-
" tute title in itself, and, as in some cases of transfer of nego-
" tiable instruments, dispense with the rule, *nemo plus juris ad*
" *alienum transferre potest quam ipse habet.*"

In Gurney *vs.* Behrend, 3 El. & B., 622, Lord Campbell, C. J., draws a distinction between a bill of exchange and a bill of lading. " A bill of lading is *not*, like a bill of ex-
" change or promissory note, a negotiable instrument which
" passes, by mere delivery, to a *bona fide* transferree for valu-
" able consideration, *without regard to the title of the parties who*
" *make the transfer.* Although the shipper may have endorsed
" in blank the bill of lading, deliverable to his assigns, his
" right is not affected by the appropriation of it without his
" authority. If it be stolen from him, or transferred without
" his authority, a subsequent *bona fide* transferree for value
" cannot make title under it as against the shipper of the
" goods. *The bill of lading only represents the goods, and in*
" *this instance* THE TRANSFER OF THE SYMBOL DOES NOT
" OPERATE MORE THAN A TRANSFER OF WHAT IT REPRE-
" SENTED."

In the face of the cases of Gumbel *vs.* Beer, and Hawkins & Roberts *vs.* Beer, it cannot be a matter of discussion, that if these intervenors had bought the cotton in question, in market overt, and had accepted delivery of it *in kind* as such purchasers, plaintiffs' lien would have attached, and they might have seized it " *in whatsoever hands or place found*," to secure the unpaid purchase price.

The authorities quoted show that the transfer of the *symbol* of ownership, the bill of lading, can have no greater effect than the transfer of the property itself.

Houston, on the law of Stoppage in Transitu, page 148, referring to the Act 18 and 19 Vict., on the subject of bills of lading, says: " It seems that the statute has not altered the

" rule, that the endorsement of a bill of lading gives no better " right to the endorsee than the endorser himself had, and that " in this respect a bill of lading differs from a bill of exchange " in the same way as it did before the statute."

In Pollard *vs.* Vinton, 105 U. S. S. C., the Court said of a bill of lading and its transfer by endorsement: " A bill of " lading is an instrument well known in commercial trans- " actions, and its character and effect have been defined by " judicial decisions. In the hands of the holder it is evidence " of ownership, special or general, of the property mentioned " in it, and of the right to receive said property at the place " of delivery. Notwithstanding it is intended to pass from " hand to hand, with or without endorsement—and it is effica- " cious for its ordinary purpose in the hands of the holder— " it is not a negotiable instrument or obligation *in the sense* " that a bill of exchange or promissory note is. Its transfer " does not preclude, as in those cases, all inquiry into the " transaction in which it originated, *because* it has come into " the hands of persons who have innocently paid value for it. " The doctrine of *bona fide* purchasers applies to it only in a " limited sense."

In the case just cited, Mr. Justice Miller was the organ of the Court. Mr. Justice Strong delivered the opinion in Shaw *vs.* Railroad Co., 101 U. S. S. C., 561.

In the latter case, the Bank, in Philadelphia, had lost possession of the original bill of lading by the fraud of Kuhn & Brother, who transferred it to Miller & Brother. The question was whether Miller & Brother acquired thereby a good title as against the Bank.

" In considering this question," says the Court, " it does not " appear to us necessary to inquire whether the effect of the " bill of lading in the hands of Miller & Brother is to be de- " termined by the law of Missouri, where the bill was given, or

" by the law of Pennsylvania, where the cotton was received. " The statutes of both States enact that bills of lading *shall be* " *negotiable by endorsement and delivery.* The statute of Penn- " sylvania declares simply, they 'shall be negotiable and may " be transferred by endorsement and delivery;' while that of " Missouri enacts that " they shall be negotiable by written en- " dorsement thereon and delivery, *in the same manner* as bills " of exchange and promissory notes.' There is no material dif- " ference between these provisions. Both statutes prescribe " the manner of negotiation, i. e., by endorsement and delivery. " Neither statute undertakes to define the effect of such a " transfer.

" We must, therefore, look outsides the Statutes to learn what " they mean by declaring such instruments negotiable. What " is negotiability ? It is a technical term, derived from the " usage of merchants and bankers, in transferring, primarily, " bills of exchange, and afterwards, promissory notes. At " common law no contract was assignable, so as to give to an " assignee a right to enforce it by suit in his own name. To " this rule bills of exchange and promissory notes, payable to " order or bearer, have been admitted exceptions, made such by " the adoption of the law merchant. They may be transferred " by endorsement and delivery, and such a transfer is called " negotiation. It is a mercantile business transaction, and the " capability of being thus transferred, so as to give to the en- " dorsee the right to sue on the contract in his own name, is " what constitutes negotiability. The term 'negotiable' " expresses, at least primarily, this mode and effect of a " transfer."

The Court then go on to state certain consequences that follow the endorsement and transfer of a bill of exchange or promissory note, as, the liability of the endorser, the loss of right to set up against a *bona fide* holder for value, before ma-

turity, defences that might have been set up against the payee, and the title of a *bona fide* purchaser for value of a lost or stolen bill of exchange or promissory note, and say:

" But none of these consequences are *necessary* attendants " or constituents of negotiability or negotiation. They may " exist without them. A bill or note *past due* is negotiable, if it " be payable to order or bearer, but its endorsement and deliv- " ery do not cut off the defence of the maker or acceptor " against it, nor create such a contract as results from an en- " dorsement *before maturity*, and does not give to the purchaser " of a lost or stolen bill the rights of the real owner.

" It does not necessarily follow, therefore, that because a " Statute has made bills of lading negotiable by endorsement " and delivery, all these consequences of an endorsement and " delivery of bills and notes, before maturity, ensue or are in- " tended to result from such negotiation.

* * * * * * *

" The function of a bill of lading is entirely different from " that of a bill or note. It is not a representative of money, " used for the transmission of money, or for the payment of " debts or for purchases. It does not pass from hand to hand " as bank notes or coin. It is a contract for the performance " of a certain duty. True, *it is a symbol of ownership of the " goods covered by it—a representative of those goods.* But if the " goods themselves be lost or stolen, no sale of them by the " finder or thief, though to a *bona fide* purchaser for value, will " divest the ownership of the person who lost them, or from " whom they were *stolen. Why, then, should the sale of the " symbol or mere representative of the goods have such effect ?*

* * * * * * *

" Bills of lading are regarded as so much cotton, grain, iron " or other articles of merchandise. The merchandise is very " often sold or pledged by transfer of the bills which cover it."

See Walter *vs.* Ross, 2 Wash., U. S. C. C., 286–'7.

In Lickbarrow *vs.* Mason, 1 Smith's Leading Cases, (Hare & Wallace's Notes), p. 1058, Buller, J., said: "This brings me to "the two great questions in the cause, which are, undoubtedly, "of as much importance to trade as any questions which ever "can arise. The first is, whether at law the property of goods "at sea passes by the endorsement of the bill of lading? The "second, whether the defendant, who stands in the place of the "original owner, had a right to stop the goods *in transitu* ? As "to the first, every authority which can be adduced from the "earliest period of time down to the present hour, agrees that "at law the property does pass as absolutely and as effectually "*as if the goods had been actually delivered into the hands of* "*the consignee.*"

Authorities to the same effect might be cited without number.

The negotiable character of a bill of lading is a qualified one, the power to pass the goods by its endorsement and delivery, but to confer no other title to the goods than the delivery of the goods would have conferred.

Let us apply these principles under the law of Louisiana to the case at bar.

Under Article 3227 of the Civil Code, before the passage of the Acts of 1854 and 1855 and their incorporation into the Article, the vendor of property, whether for cash or on credit, had lien thereon, to secure payment of the purchase price, *as long as the property remained in possession of the vendee.*

Sale and actual delivery of the property to a third person, or symbolic delivery thereof, by endorsement and delivery of the bill of lading to the purchaser, divested the lien.

The civil law and the common law, so far, differ in no respec t except that, under the common law, delivery to the vendee

divested the lien; under the civil law it existed as long as the property was in possession of the vendee.

But the Statutes referred to, and the amended Code for certain limited transactions and for certain definite purposes, went further, and provided that the vendor, in New Orleans, of agricultural products of the United States, should have a SPECIAL *lien* thereon, to secure payment of the purchase price, for and during the space of five days only after the day of delivery, within which time the vendor might seize the same *in whatsoever hands or place* they might be found, and his claim for the purchase price should have preference *over all others*.

During the limited time mentioned, nothing was to be suffered to stand between the vendor and his lien. As to purchasers, as in Gumbel *vs.* Beer, and Hawkins & Roberts *vs.* Beer, and *as to an endorsee of a bill of lading*, as in Tyree *vs.* Sand, and in Harris, Parker and Co., *vs.* Nicolopulo, the vendor's lien has been held paramount by the Supreme Court of the State. And in no case, though in two cases, to wit: Delgado *vs.* Wilbur, 24 An., 82, and Howell *vs.* Parish, 26 An., 6, the intervenor has held bills of lading, has *that fact* constituted an element in the Court's opinion in favor of the holder—and it is scarcely conceivable that the transfer of the symbol merely of ownership should effect, what the transfer of the goods themselves would fail to do.

The cases of Florsheim Bros. *vs.* Howell, 33 La. An., 1188, and Pheips & Co., *vs.* Howell, 35 La. An., 88, were quoted by plaintiffs in error in the Circuit Court, as contrary to the doctrine herein contended for. It is enough to say that neither case was based on the provision of the closing paragraph of Article 3227 of the Louisiana Code, invoked by defendants in error.

Defendants in error further submit that this cause is to be

determined according to the law of Louisiana, creating the *special* lien for which they are contending; that the rights of the purchaser of a bill of lading, or the pledgee thereof for value, are the same *by law*, and are so recognized by law and by the highest Court in Louisiana, as in the commercial world outside; that the creation of liens and the granting of remedies, by State Statutes, is not repugnant to any principle or rule of the general commercial law; and that there is no question in the case, involving a conflict between the *jurisprudence* of Louisiana and any such rule or principle.

It might as well be said that because the laws of Louisiana recognize the lien of the vendor upon personal property after its delivery to the vendee, while the common or the general commercial law does not, then that the remedy for enforcing the vendor's lien in any case in the Federal Court must be denied. The Admiralty law is full of instances where liens outrank every right or title, except that acquired by purchase through an Admiralty Court. Builders' and mechanics' lien laws furnish other instances where the Statute protects a favored creditor against the world; and, it is submitted, that where the Court has jurisdisdiction, as between parties and for amounts dependant on such liens, the United States Court equally with the State Court is competent to give the remedy accorded by the local law.

It is submitted that the rule of decision is as set forth in the 34th Section of the Judiciary Act of 1789 (Section 721, Revised Statutes), and, that the law of Louisiana invoked in no wise trenches upon the domain of commercial law within the meaning of that term as stated in

Swift *vs.* Tyson, 16 Peters, pp. 18 and 19;

Railroad Co. *vs.* National Bank, 102 U. S. S. C., pp. 54 and 57.

Oates *vs.* National Bank, 100 U. S. S. C., 246;

Mercer County *vs.* Hacket, 1 Wal., 96;

Congling's Treatise, Fifth Ed., pp. 138, 140.

Again, the State Statute and the jurisprudence of the State Courts founded thereon, relate to matters of *remedy* alone.

By the Fourth Section of the Act of Congress of March 3, 1875, it is provided "that when any suit shall be removed from "a State Court to a Circuit Court of the United States, any "*attachment* or *sequestration of the goods* or estate of the "defendant had in such suit in the State Court, shall hold the "goods or estate so attached or sequestered to answer to the "final judgment or decree in the same manner as by law they "would have been held to answer final judgment or decree had "it been rendered by the Court in which suit was commenced," &c. This cause was removed from the State Court to the Circuit Court under the Act of 1875.

And Rev. Stat. U. S., Sec. 916, giving in Circuit and District Courts of the United States to the plaintiff "similar remedies, "by attachment or other process, against the property of the "defendant, which are now provided by the laws of the State "in which such Courts is held for the Courts thereof."

The title of Brown Bros. & Co. to the Cotton, was encumbered with the lien of the vendor, as they knew it was liable to be. They took the Cotton or the Bill of Lading representing it, *cum onere*.

As was said by the Supreme Court of Louisiana in Gumbel *vs.* Beer, 36 La. An., 494, "the plaintiffs having their lien and